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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CEDRIC DEMETRIUS WEATHERSPOON et al., Defendants and Appellants.	B196880 (Los Angeles County Super. Ct. No. BA278906)

APPEALS from judgments of the Superior Court of Los Angeles County, Michael M. Johnson, Judge. Reversed and remanded with directions as to Weatherspoon. Affirmed as to Wilson.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Darryl B. Wilson.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant Cedric Demetrius Weatherspoon.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Cedric Demetrius Weatherspoon appeals from the judgment entered following his convictions by jury on count 1 – conspiracy to sell cocaine (Pen. Code, § 182, subd. (a)(1)), count 2 – possession of cocaine base for sale (Health & Saf. Code, § 11351.5) personally armed with a firearm (Pen. Code, § 12022, subd. (c), count 3 – possession of an assault weapon (Pen. Code, § 12280, subd. (b)), count 4 – possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)), and count 5 – maintaining a place for selling controlled substances (Health & Saf. Code, § 11366), and following his plea of no contest on count 9 to transporting, furnishing, or selling a controlled substance (Health & Saf. Code, § 11379.5, subd. (a)) with an admission he suffered a prior felony conviction for which he served a separate prison term (Pen. Code, § 667.5, subd. (b)), following the denial of a suppression motion (Pen. Code, § 1538.5). The court sentenced Weatherspoon to prison for 12 years. As to Weatherspoon, we reverse the judgment and remand the matter with directions.

Darryl B. Wilson appeals from the judgment entered following his conviction by jury on count 7 – possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) with an admission he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)), following the denial of a suppression motion (Pen. Code, § 1538.5). The court sentenced Wilson to prison for two years. As to Wilson, we affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that the Los Angeles Police Department conducted an investigation of appellants as part of an investigation of drug trafficking organizations. Police obtained a search warrant and wiretap order permitting the interception of, inter alia, communications on a cell phone belonging to Weatherspoon, a major narcotics trafficker. Intercepted communications led police to execute, on October 6, 2004, a search warrant for a Los Angeles residence on Bandera Street, where Weatherspoon's grandmother lived and where appellants, felons, had been that day. Police found there evidence that

Weatherspoon committed the offenses at issue in counts 1 through 5, and 9. On February 16, 2005, police executed a search warrant for Wilson's residence in Bloomington, California, and recovered a shotgun (count 7).

CONTENTIONS

Weatherspoon claims the trial court erred (1) as to count 4 by denying his motion to quash the warrant pertaining to the wiretap order, (2) by failing to conduct an in camera hearing as required by *People v. Hobbs* (1994) 7 Cal.4th 948, and (3) as to counts 3 and 4, by receiving an officer's testimony concerning the meaning of certain words spoken during intercepted communications. Wilson claims the trial court erred by denying his (1) motion to traverse the residential search warrant, and (2) motion for a mistrial based on alleged *Wheeler/Batson* error.

DISCUSSION

1. *The Court Properly Denied Weatherspoon's Motion to Quash the Wiretap Warrant to the Extent He Challenged the Necessity Showing in the Affidavit Supporting the Wiretap Order.*

a. *Pertinent Facts.*

(1) *The Motion to Quash the Warrant and Suppress Evidence.*

On March 6, 2006, Weatherspoon filed motions to quash and traverse the wiretap search warrant, and to suppress evidence obtained as result of the wiretap order.[1] Attached to the motion were the order and its supporting affidavit, both signed on September 3, 2004. The affidavit was signed by Los Angeles Police Detective Brian Agnew.

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[1] Penal Code section 629.72, provides, "Any person in any trial . . . may move to suppress . . . the contents of any intercepted . . . electronic cellular telephone communications, or evidence derived therefrom, only on the basis that the contents or evidence were obtained in violation of the Fourth Amendment of the United States Constitution or of this chapter. The motion shall be made, determined, and be subject to review in accordance with the procedures set forth in Section 1538.5."

In the section of the affidavit entitled "Expertise and Introduction," Agnew indicated he was assigned to the Major Violators Section of the Narcotics Division, and was assigned to a High Intensity Drug Trafficking Area Task Force. Agnew was an expert concerning possession, possession for sale, and sales of controlled substances, and had testified as an expert in municipal, superior, and federal courts. He had successfully completed the State of California Department of Justice prescribed course of training, was certified to conduct official interception of wire communications as authorized by California Penal Code section 629 et seq., and had intercepted hundreds of monitored calls. Agnew knew narcotics traffickers commonly used, inter alia, cell phones to operate their trafficking business.

Agnew also indicated that, based on the information contained in the affidavit, he was applying for a wiretap order authorizing him to intercept the communications of "telephone number 323-791-1606" (target phone) "involving communications of Cedric Demetrius Weatherspoon." Investigation by Agnew revealed Weatherspoon was the head of a drug trafficking organization based in South Central Los Angeles, and he was trafficking large quantities of cocaine throughout Los Angeles County and the United States. Information contained in the affidavit and in toll records for the target phone indicated Weatherspoon was utilizing the target phone to conduct his narcotics trafficking and distribution business. Probable cause existed to believe that particular communications concerning the illegal activities would be obtained as a result of the wiretap order.

In the section of the affidavit entitled "Background and Historical Information," Agnew indicated that, through his investigation, he had learned detailed information regarding a ring of individuals involved in the distribution of 20 to 30 kilograms of cocaine a month to the Los Angeles County area and other states. Weatherspoon was involved in transporting narcotics to Nevada, Mississippi, and Louisiana.

Weatherspoon was a member of the Grape Street Crips gang. The gang controlled the area in and around the Jordan Downs Housing Development, located in South Central Los Angeles. Weatherspoon worked with a close group of fellow gang members, including his brother who would transport narcotics from Los Angeles to Las Vegas.

Weatherspoon had several sources of supply. These sources were Mexican nationals importing large kilogram quantities of cocaine from Mexico into the United States. Weatherspoon bought several kilograms of powder cocaine per week. Weatherspoon then brought the powder cocaine to the Watts area, where he manufactured the powder cocaine into rock cocaine. Once the powder cocaine was converted into rock cocaine, Weatherspoon distributed the rock cocaine to other trusted coconspirator gang members, and the rock cocaine was distributed to various rock houses and street narcotics dealers in Watts, and in South Central and downtown Los Angeles. Over 13 Grape Street Crips gang members had been arrested for narcotics offenses in the downtown area of Los Angeles between October 2003 and February 2004.

In the section of the affidavit pertaining to the target phone, Agnew indicated the named subscriber for the phone was Tony Cox, located at 11431 South Normandie in Los Angeles. It was common for subjects involved in narcotics trafficking to have a false subscriber name or address for a cell phone. Agnew had been unable to locate any information related to Cox, and Agnew believed the name was fictitious. The address of 11431 South Normandie, apartment 4, Los Angeles, was reflected on Weatherspoon's driver's license and was the residence of his sister. Agnew believed the primary users of the target phone were Weatherspoon and unknown coconspirators. As of August 26, 2004, the target phone was still active.

Following a section of the affidavit pertaining to Weatherspoon (including his extensive criminal record), the affidavit contained a section summarizing, inter alia, probable cause. In that section, Agnew indicated that between May 17, 2004, and August 6, 2004, the target phone had a total of 7,103 incoming and outgoing calls, and the high number of calls was consistent with the use of the phone by a narcotics trafficker.

In the section of the affidavit entitled "Necessity," Agnew alleged the necessity of the wiretap order, and his necessity showing is summarized below. Agnew stated, "Interception of . . . communications is necessary in this matter because normal investigative techniques have been tried and failed [*sic*], or reasonably appear unlikely to succeed if tried or are too dangerous to attempt. The following is a list of investigative techniques, which have been used, or which [Agnew] had considered using, to date in this investigation, and an explanation concerning why these techniques have been unsuccessful, or why they appear to be unlikely to succeed or to be too dangerous."

As to confidential informants and undercover officers, Agnew stated he and other officers were unaware of any confidential informants, or undercover officers, able to assist in: (1) identifying the source(s) of the supply of narcotics, (2) identifying additional participants in the narcotics trafficking organization and their respective roles, (3) ascertaining the methods of importation and distribution of narcotics, (4) identifying the customers to whom Weatherspoon distributed the cocaine, (5) locating stash houses, warehouses, or any facility used by Weatherspoon to store narcotics, and (6) ascertaining the manner in which the organization conceals the proceeds of the narcotics trafficking. Large-scale narcotics trafficking organizations were compartmentalized to protect the organization by making sure its members often did not know each other. Moreover, use of confidential informants or undercover officers was extremely dangerous. Narcotics traffickers have killed suspected informants.

As to witnesses, Agnew stated there were no witnesses available who could provide any information regarding Weatherspoon, much less information necessary to accomplish the goals of the current investigation. Officers had been unable to obtain information regarding Weatherspoon's organization from any of the more than 13 suspects arrested in Los Angeles Police Department's central division.

The only individuals knowledgeable about the contents of the conversations and transactions relating to the criminal conspiracy were the subjects themselves. It was unreasonable to expect they would provide truthful information absent immunity grants, such grants would immunize culpable persons, and the grants could not ensure truthful

testimony. Moreover, the subjects would immediately be alerted to the government's investigation, which might result in the destruction of evidence, threats of harm to suspected informants, and flight. Interviews with narcotics dealers and their customers were generally unproductive because such individuals fear for their safety and because of their own culpability. Interviews were unlikely to advance, and would more likely impede, the government's investigative objectives.

As to grand jury subpoenas, Agnew stated he believed the issuance of such subpoenas would probably be unsuccessful in achieving the goals of this investigation for the following reasons: (1) the current targets of the investigation would likely invoke their Fifth Amendment privilege, (2) efforts to obtain grand jury immunity for coconspirators would be unwise as it would likely foreclose prosecution of the most culpable individuals, and (3) the issuance of such subpoenas to lower-level members of the organization, if identified, would likely alert other members to the existence of the investigation, thereby impeding it.

As to surveillance, Agnew stated he did not believe that physical surveillance would achieve the government's objectives. Surveillance alone rarely succeeded in gathering sufficient evidence of criminal activities. Surveillance could confirm meetings and other suspected activities, but often left investigators with insufficient evidence to prove the purpose of the activities. Also, surveillance of major narcotics traffickers was often difficult to perform without detection.[2] Agnew believed the interception of the

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[2] Agnew cited, inter alia, specific instances of unsuccessful surveillance conducted by his officers concerning Weatherspoon. On May 27, 2004, Agnew's officers conducted surveillance of a parking lot on East 102nd Street in Los Angeles. Officers saw Weatherspoon standing next to his 2001 Pontiac but had difficulty observing it from their vantage point. A woman later drove the vehicle, and officers were subsequently unable to locate Weatherspoon. On June 8, 2004, officers conducted surveillance of Weatherspoon, who entered his vehicle and engaged in countersurveillance driving. With the later help of fellow gang members driving other vehicles, Weatherspoon eluded the police surveillance, and gang members later followed police surveillance cars. Between May and August 2004, officers conducted surveillance of the Normandie address. The officers never saw Weatherspoon enter or exit the location. The officers also went by the location on August 17, 2004, and did not see him there.

target phone would provide him with information enabling him to identify locations associated with Weatherspoon.

As to search warrants, Agnew stated that, even if potential locations were known at the time he presented the affidavit, warrants would not provide sufficient evidence necessary to determine the full scope of the criminal activities, the various methods being used by the members of the organization, or the identities of those involved. Records created and kept by criminal conspirators are often difficult to interpret because of coded information contained in them. Moreover, even if items such as large amounts of currency, documents listing addresses and telephone numbers, and other papers were seized, they generally would have far less probative value by themselves than when they were introduced along with conversations between conspirators, which would give full meaning to the documents.

Agnew did not know the identities of members of the organization in Los Angeles other than the persons previously identified in the affidavit. Even if Agnew identified the other members, he did not know where they resided, and even if he knew where they resided and he conducted searches, he did not believe the fruits of searches alone would yield sufficient evidence to indict the members. For example, higher-level members of an organization did not store cocaine at their residences. Moreover, execution of warrants on locations controlled by the organization would almost certainly result in the premature termination of the investigation. Warrants might be a useful tool only when the objectives of the investigation were closer to completion.

As for trash searches, Agnew had found that high-level narcotics traffickers only rarely, if ever, used residential trash containers to dispose of valuable information. Agnew believed trash searches were unlikely to achieve the government's objectives in this case. Even if officers conducted trash searches and obtained evidence of cocaine trafficking, that evidence would almost certainly not establish the identities of (1) distributors, (2) the source(s) of cocaine, (3) coconspirators, or (4) methods of supply and distribution. On August 17, 2004, Agnew's assisting officers conducted surveillance of an apartment that shared a large apartment trash bin. Officers would not have been

able to search the bin without attracting attention and, in any event, the trash would have been commingled.

As to pen registers and telephone toll records, Agnew stated agents would use pen registers, trap and trace devices, and toll record analysis during the investigation. Pen register and toll information provided identifying information regarding calls made from a telephone. These techniques would provide a list of numbers called, but would not provide the identities of persons called or the content of conversations. A trap and trace device would identify the number of the telephone that dialed the target phone. A trap and trace device would not yield sufficient investigative results because most narcotics traffickers did not use their own names and addresses when using cell phones. Agnew did not believe pen registers, trap and trace devices, toll record analysis, or subscriber information would achieve the government's investigative objectives.

On March 17, 2006, the People filed an opposition to Weatherspoon's suppression motion.

(2) *The Court's Ruling.*

At the May 4, 2006 hearing on Weatherspoon's motion, the court indicated there was no dispute Agnew was a qualified expert. The court indicated that, based on all the facts, the magistrate was reasonable in issuing the wiretap order. The court denied Weatherspoon's motion to quash the warrant. There is no dispute that evidence obtained as a result of the execution of the warrant was introduced at trial.

b. *Analysis.*

In *People v. Leon* (2007) 40 Cal.4th 376 (*Leon*), our Supreme Court stated, in relevant part, "'In general, California law prohibits wiretapping.' [Citations.] The Presley-Felando-Eaves Wiretap Act of 1988 authorized specified law enforcement officials to apply for a court order to intercept wire communications, but only where there was probable cause to believe the target was involved in the importation, possession for sale, transportation, manufacture, or sale of heroin, cocaine, PCP, or methamphetamine in specified quantities, or in a conspiracy to commit those offenses. [Citations.] In 1995, the Legislature enacted [Penal Code] section 629.50 et seq. in order 'to expand California

wiretap law to conform to the federal law.' [Citation.] Thus, the district attorney or other specified individual could apply to the presiding judge of the superior court (or a designee) for an order to intercept not only wire communications but also . . . 'electronic cellular telephone' communications. [Citation.]

"Under current [Penal Code] section 629.52, the designated judge may authorize a wiretap if there is [requisite probable cause] and *'[n]ormal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous'* [Penal Code, § 629.52, subd. (d)]." (*Leon, supra,* 40 Cal.4th at pp. 383-384, italics added.) The italicized language is the necessity requirement.[3]

"The requirement of necessity is designed to ensure that wiretapping is neither 'routinely employed as the initial step in criminal investigation' [citation] nor 'resorted to in situations where traditional investigative techniques would suffice to expose the crime.' [Citation.] The necessity requirement can be satisfied 'by a showing in the application that ordinary investigative procedures, employed in good faith, would likely be ineffective in the particular case.' [Citation.] As numerous courts have explained, though, it is not necessary that law enforcement officials exhaust every conceivable alternative before seeking a wiretap. [Citations.] Instead, the adequacy of the showing of necessity '"is "to be tested in a practical and commonsense fashion,' . . . that does not 'hamper unduly the investigative powers of law enforcement agents.'"' [Citation.] A determination of necessity involves '"a consideration of all the facts and circumstances."' [Citation.] [¶] The finding of necessity by the judge approving the wiretap application is entitled to substantial deference. [Citations.]" (*Leon, supra,* 40 Cal.4th at p. 385.)

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3 Penal Code section 629.52, states, in relevant part, "Upon application made under Section 629.50, the judge may enter an ex parte order, as requested or modified, authorizing interception of . . . electronic cellular telephone communications . . . if the judge determines, on the basis of the facts submitted by the applicant, all of the following[.]" Subdivisions (a) through (c) set forth the requisite court determinations of probable cause. Subdivision (d) contains the necessity requirement.

Like the defendants in *Leon*, Weatherspoon does not challenge the magistrate's finding of probable cause as to the wiretap order at issue. Instead, like the *Leon* defendants, Weatherspoon complains the wiretap application was not supported by an adequate showing of necessity for purposes of Penal Code section 629.52, subdivision (d); therefore, the application also violates the Fourth Amendment. (See *Leon, supra,* 40 Cal.4th at p. 384.) Weatherspoon also complains the application's showing violates the necessity requirement of Title 18 United States Code section 2518, subdivision (3)(c), which is part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. We note "[w]ith respect to necessity, . . . state law and federal law employ nearly identical language. Each requires the judge, before authorizing a wiretap, to find that normal investigative techniques 'have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.' (18 U.S.C. § 2518, subd. (3)(c); see Pen. Code, § 629.52, subd. (d).)" (*Leon, supra,* 40 Cal.4th at p. 385.)[4]

We have recited the pertinent facts. The showing in Agnew's affidavit is very similar to the showing which our Supreme Court found sufficient in *Leon*. (*Leon, supra,* 40 Cal.4th at pp. 386-396.) Giving substantial deference to the finding of the magistrate who issued the wiretap order, we conclude the affidavit amply demonstrated the necessity of the issuance of the order. The order was properly issued, its issuance did not violate the state or federal statute at issue or the Fourth Amendment, and the trial court properly denied Weatherspoon's motions to quash the warrant and suppress evidence to the extent he challenged the necessity showing in the affidavit. (*Id.* at pp. 389-396.) None of Weatherspoon's arguments compel a contrary conclusion.

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[4] Title 18 United States Code section 2518 (3) (like Penal Code section 629.52) also sets forth requisite court determinations of probable cause not at issue here.

2. *The Trial Court Erred by Failing to Conduct an In Camera Hearing, and Remand Is Appropriate to Permit the Trial Court to Determine Whether the Magistrate Erroneously Failed to Retain the Sealed Confidential Attachment.*

a. *Pertinent Facts.*

As mentioned, on March 6, 2006, Weatherspoon filed motions to quash and traverse the warrant, and to suppress evidence, based on the above mentioned wiretap order. He challenged the order on the grounds its supporting affidavit lacked probable cause and an adequate showing of necessity.

The affidavit contained a section entitled "Summary of Probable Cause and Basis for Belief that Interception is Necessary." (Some capitalization omitted.) A footnote at the end of that title said, "Additional information related to Probable Cause may or may not be contained in the ***Hobbs*** Confidential Attachment attached hereto and incorporated herein by this reference." The affidavit later requested "that the Court order seal[], pursuant to [*People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*)] and California Evidence Code sections 1040-1042, the attached 'Confidential *Hobbs* Attachment' which is incorporated herein."

Section 13 of the wiretap order, which was issued by the magistrate on September 3, 2004, stated, "The Application and Court order shall be sealed and kept in the custody of the United States Drug Enforcement Administration and/or the Los Angeles County District Attorney's Office. (Penal Code Section 629.66.) Furthermore, the section of the affidavit entitled '***Hobbs*** Confidential Attachment' is ordered sealed within the meaning of *People v.* [*Hobbs*, *supra*,] 7 Cal.4th 948 and Evidence Code Sections 1040-1042." We will refer to the attachment as the sealed affidavit.

Weatherspoon, in his written motion, did not expressly refer to any confidential informant(s) that may have been referred to in the sealed affidavit, and did not expressly refer to said sealed affidavit. Nor did Weatherspoon, in his written motion, request that the court conduct an in camera hearing to determine if he could obtain discovery concerning any such confidential informant(s) in order to support his motions to quash, traverse, and suppress.

On March 17, 2006, the People filed an opposition to Weatherspoon's motion. The opposition indicated as follows. The unredacted affidavit set forth probable cause. The magistrate who issued the warrant properly sealed the confidential attachment. The People would provide an unredacted copy of the wiretap affidavit "to the Court during the in camera hearing for review." *Hobbs* created an exception to the requirement of *Franks v. Delaware* (1978) 438 U.S. 154 [98 S.Ct. 2674] (*Franks*) that a defendant make a preliminary showing as part of a motion to traverse. The opposition then stated, "given that a portion of the affidavit is sealed, the Court should conduct a *Franks* style inquiry during the in camera hearing, without requiring the defense to make a preliminary showing."

On May 4, 2006, the prosecutor was present in court but neither Weatherspoon nor his counsel were present. The court called the matter and said, "I know there have been people here." The clerk told the court that Weatherspoon was submitting the matter. The prosecutor noted his written motion indicated that if the court needed to conduct an in camera hearing, the People were available. The prosecutor indicated the affiant pertaining to the Weatherspoon wiretap warrant was en route and would be present in about ten minutes. The prosecutor also indicated if the court wanted to conduct the in camera hearing, the prosecutor was ready, otherwise, the prosecutor would submit the matter. The court asked if Weatherspoon had submitted the matter, and the prosecutor indicated yes. The court indicated it did not need to conduct an in camera proceeding. The court then handled unrelated cases.

The court later called the matter and, again, neither Weatherspoon nor his counsel were present. The following then occurred: "[The Prosecutor]: Your Honor, if you are going to make a ruling, I think [Weatherspoon's counsel] said she wanted to be here for the ruling; but if it was going to be anything other than that, she said, . . . if you were just going in chambers -- [¶] The Court: I'm going to give you a basis for my ruling. I don't think I need to go into chambers." The prosecutor then stated, "maybe we should bring [Weatherspoon's counsel] up. Only because she said that any kind of commentary

ruling, anything that the court is going to say -- . . ." The court agreed Weatherspoon's counsel should be present before the court conducted further proceedings.

The court later called the case, and all parties and their counsel were present. The court, after discussing the facts set forth in the probable cause showing in the affidavit, stated, "I'm assuming that some of this was documented in the *Hobbs* sealed portions of the warrants, but I have not addressed the *Hobbs* issue because I'm going to rule based on the facts that I've stated that these facts would be enough probable cause to issue a wiretap warrant." (*Sic*.) The court denied Weatherspoon's motions to quash and traverse the warrant.

Weatherspoon's counsel stated, "Well, the court has already pointed out the points or the arguments that I made in my moving papers. So I'll submit it unless the D.A. has something that she would like to address." The prosecutor invited the court's attention to the "traversal issue" which the prosecutor previously had raised. The prosecutor then indicated as follows. Under *Franks* and *Hobbs*, when a court was presented with a motion to traverse which was supported by a partially- or completely-sealed affidavit, there was a presumption that the defendant had made the requisite substantial preliminary showing, and "the in-camera hearing then needs to occur." During the in camera hearing, the court was supposed to review the affidavit as a whole to determine whether the affiant to some extent intentionally misled the magistrate into finding that probable cause existed. Since the affidavit in the present case was partially sealed, Weatherspoon had met his initial burden, and the prosecutor wanted to know if the court felt it should conduct the in camera hearing pursuant to *Franks* and *Hobbs*.

The court stated, "I think there was enough in the affidavit without considering what was contained in the *Hobbs* portion." The court later stated, "I don't think it is necessary for purposes of ruling on the validity of the wiretap warrant or the authority [of the magistrate] . . . to issue it . . . to review the *Hobbs* portion of the affidavit. There isn't a claim, I don't think at this point, at least, there is no claim by [Weatherspoon's counsel] that it's necessary to do it because the People are going to use that information in their case in chief." The People denied they intended to "use the *Hobbs* information." The

court replied, "so I don't think it's necessary." There is no dispute the trial court denied Weatherspoon's suppression motion and that evidence obtained as a result of the execution of the warrant was introduced into evidence at trial.

b. *Analysis.*

(1) *The Court Erroneously Failed to Conduct an In Camera Hearing.*

Hobbs, supra, 7 Cal.4th 498, sets forth procedures a trial court must follow when, after a search warrant and affidavit have been sealed because they are based on information from a confidential informant, a defendant brings motions to quash and traverse the warrant, to disclose the information in the sealed affidavit, and to identify the confidential informant. Weatherspoon claims the trial court erroneously failed to comply with *Hobbs*. We agree since the trial court failed to conduct the requisite in camera hearing.

All or any part of a search warrant may be sealed to protect a confidential informant's identity. (*Hobbs, supra,* 7 Cal.4th at p. 971.) If a search warrant has been sealed, certain procedures should be followed "to strike a fair balance between the People's right to assert the informant's privilege and the defendant's discovery rights." (*Id.* at p. 972.) The defendant may file a motion to quash or traverse the search warrant, and the trial court "should" then conduct an in camera hearing to determine whether sufficient grounds exist to maintain the confidentiality of the informant's identity and whether the affidavit has been properly sealed. (*Ibid.*) Defense counsel, who may be excluded from this hearing, may submit written questions to be asked of any witness called to testify at the hearing. (*Id*. at p. 973.) "Because, in sealed affidavit cases . . . , the defendant may be completely ignorant of all critical portions of the affidavit, the defense will generally be unable to specify what materials the court should review in camera. The court, therefore, must take it upon itself both to examine the affidavit for possible inconsistencies or insufficiencies regarding the showing of probable cause, and inform the prosecution of the materials or witnesses it requires. The materials will invariably include such items as relevant police reports and other information regarding the informant and the informant's reliability." (*Ibid.*)

If the court concludes that the affidavit was properly sealed, it must then consider the motions to traverse and quash. (*Hobbs, supra,* 7 Cal.4th at p. 974.) "In ruling on the motion to traverse, the court *must* 'determine whether the defendant's general allegations of material misrepresentations or omissions are supported by the public *and sealed portions of the search warrant affidavit*, including any testimony offered at the in camera hearing. . . . [¶] If the trial court determines that the materials and testimony before it do not support defendant's charges of material misrepresentation, the court should simply report this conclusion to the defendant and enter an order denying the motion to traverse. [Citations.]'" (*People v. Galland* (2004) 116 Cal.App.4th 489, 493 (*Galland I*), italics added.) But if "the court determines there is a reasonable probability that defendant would prevail on the motion to traverse . . . the district attorney must be afforded the option of consenting to disclosure of the sealed materials, in which case the motion to traverse can then proceed to decision with the benefit of this additional evidence, and a further evidentiary hearing if necessary [citations], or, alternatively, suffer the entry of an adverse order on the motion to traverse. [Citation.]" (*Hobbs, supra,* 7 Cal.4th at pp. 974-975.)

Similarly, on a motion to quash the search warrant, "[i]f the court determines, based on its review of *all* the relevant materials, that *the affidavit* and related materials furnished probable cause for issuance of the warrant under *Illinois v. Gates* [(1983)] 462 U.S. 213 [76 L.Ed.2d 527], the court should simply report this conclusion to the defendant and enter an order denying the motion to quash. [Citations.] If, on the other hand, the court determines, based on its review of *all* relevant materials and any testimony taken at the in camera hearing, that there is a reasonable probability the defendant would prevail on his motion to quash the warrant[,] . . . then the district attorney must be afforded the opportunity to consent to disclose the sealed materials to the defense . . . or, alternatively, suffer the entry of an order adverse to the People on the motion to quash the warrant. [Citation.]" (*Hobbs, supra,* 7 Cal.4th at p. 975, italics added.)

But, in "*all instances*, a sealed transcript of the *in camera* proceedings, and any other sealed or excised materials, should be retained in the record along with the public portions of the search warrant application for possible appellate review." (*Hobbs*, *supra*, 7 Cal.4th at p. 975, italics added.)

Hobbs states that when a defendant files a motion to quash or traverse a search warrant, the lower court "should" (*Hobbs*, *supra*, 7 Cal.4th at p. 972) conduct an in camera hearing under the guidelines set forth in section 915 and *People v. Luttenberger* (1990) 50 Cal.3d 1, to determine whether the informant's identity should remain confidential and whether the affidavit is properly sealed. (*Ibid.*) But *Hobbs* clearly contemplates that the nature of the proceedings will generally require an in camera hearing. (See, e.g., *Galland I*, *supra*, 116 Cal.App.4th at p. 495 [trial court had "no discretion to forgo the in camera review necessitated by Galland's motion to discover the sealed materials and to traverse or quash the warrant"].)

There is no dispute that, on May 4, 2006, the trial court in the present case failed to conduct an in camera hearing. *Hobbs* required one. It is permissible to ignore misrepresentations in an affidavit to determine if remaining allegations establish probable cause, thereby safeguarding the defendant's right against unreasonable searches and seizures. It is impermissible to ignore allegations in a sealed affidavit containing confidential informant information and to fail to conduct an in camera hearing to determine whether the affidavit was properly sealed in the first place, and whether there is a reasonable probability the defendant's motions to quash or traverse would be successful with the result the defendant would have a right to discover the otherwise confidential information. It is one thing to say a defendant will not review a sealed affidavit. It is another to say that neither the defendant nor a trial court will do so. The trial court erred by failing to conduct the in camera hearing. We will reverse the judgment as to Weatherspoon and remand the matter with directions to the trial court to conduct the in camera hearing. (Cf. *People v. Estrada* (2003) 105 Cal.App.4th 783, 797.)

Respondent claims Weatherspoon waived the issue of whether the trial court erred by failing to conduct the in camera hearing. We disagree. On two occasions before Weatherspoon or his counsel were even present in the courtroom, as well as on one occasion after all parties were present, the court indicated it was not going to conduct an in camera hearing (even after the prosecutor indicated *Hobbs* required one). Even assuming that, when a search is based on a warrant, the making of motions to quash, traverse, and suppress do not, by themselves, trigger a trial court duty to conduct an in camera hearing to the extent the warrant is based on a sealed affidavit containing confidential informant information, any objection by Weatherspoon to the trial court's failure to conduct an in camera hearing here would have been futile; therefore, Weatherspoon did not waive this issue. (Cf. *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4.)[5]

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[5] We note when the trial court called the matter on May 4, 2006, the court suggested the parties and/or counsel had been present earlier, and the prosecutor and clerk indicated Weatherspoon had submitted the matter. The prosecutor later represented to the court, "if you are going to make a ruling, I think [Weatherspoon's counsel] *said* she wanted to be here for the ruling; but if it was going to be anything other than that, she *said*, . . . *if you were just going in chambers* . . . ." The court then interrupted the prosecutor and indicated it did not think it needed to go into chambers. However, the prosecutor's representations, fairly read, suggest Weatherspoon's counsel had conveyed to the prosecutor (1) the court might rule on Weatherspoon's motions without conducting an in camera hearing, in which case Weatherspoon's counsel wished to be present when the court ruled, or (2) the court might rule on Weatherspoon's motions after conducting an in camera hearing, in which case Weatherspoon's counsel did not wish to be present in court while the in camera hearing was occurring (since Weatherspoon's counsel would be excluded from the in camera hearing). That is, the trial court had reason to know based on the prosecutor's representations and the clerk's statements that Weatherspoon's counsel contemplated the possibility of the court conducting an in camera hearing. Finally, even if, by failing to object on May 4, 2006, Weatherspoon waived the issue of whether the trial court erroneously failed to conduct an in camera hearing, we would have decided the issue to forestall a claim of ineffective assistance of counsel. (See *People v. Turner* (1990) 50 Cal.3d 668, 708.)

Respondent suggests the trial court's comments virtually invited Weatherspoon to object. We disagree. The trial court's comments focused on Weatherspoon's failure to demand an in camera hearing with respect to the issue of the People's use of the confidential information *at trial*. However, whether Weatherspoon failed to demand an in camera hearing on that issue was irrelevant to the issue of whether Weatherspoon was entitled to an in camera hearing with respect to his motions to quash, traverse, and suppress.

On the merits, respondent claims the trial court did not err by failing to conduct the in camera hearing because the sealed affidavit was only a small portion of the entire affidavit. The record fails to reflect this. In any event, as the People conceded below, Weatherspoon was entitled to the in camera hearing whether the sealing of the affidavit was total or, as here, partial.

(2) *Remand Is Appropriate as to Weatherspoon's Claim that the Magistrate Erroneously Failed to Retain the Sealed Confidential Attachment.*

This appeal was pending when our Supreme Court recently decided *People v. Galland* (2008) 45 Cal.4th 354 (*Galland II*). Relying in part on the appellate decision underlying *Galland II*, Weatherspoon claims the magistrate's alleged failure to retain the sealed confidential attachment violated Weatherspoon's right to due process.

In *Galland II*, police executed, on August 9, 2001, a search warrant which was issued that day and supported in part by information provided by a confidential informant. On August 17, 2001, police returned the warrant to a second magistrate (hereafter, magistrate) who, at the affiant's request, and in order to protect the identity of the confidential informant, ordered sealed, inter alia, that portion of the supporting affidavit which contained the probable cause showing. The magistrate also ordered the affiant's police department to retain said sealed affidavit, and the affiant took it there. The defendant later moved to quash, traverse, and suppress. He also challenged the warrant on the ground the affiant had failed to file in the court file the complete affidavit, including the sealed affidavit. The defendant also requested an in camera review of the sealed affidavit to determine whether it contained probable cause and whether any of the

sealed affidavit could be disclosed without jeopardizing the identity of the confidential informant.[6] (*Galland II*, at pp. 360-361.)

In June 2004, the court called the case for the in camera review. (*Galland II, supra*, 45 Cal.4th at p. 362.) The parties effectively stipulated that the affiant brought to court that day the sealed affidavit which the issuing magistrate had reviewed on August 9, 2001, and which the second magistrate, on August 17, 2001, had ordered the affiant to retain. (*Id*. at pp. 362-363, 371-372.) After the court reviewed the sealed affidavit in camera, the court denied the defendant's motions to quash, traverse, and suppress, ordered that a copy of the sealed affidavit be placed in the court file, and ordered that the original be returned to the affiant. The defendant appealed the denials of his motions. (*Id*. at p. 362.)

During the pendency of the appeal, the appellate court learned the original sealed affidavit had been lost and/or destroyed. However, the district attorney provided to the appellate court a document purporting to be a copy of the entire affidavit, including the previously sealed affidavit. The appellate court remanded with directions to the trial court to determine if it could authenticate the document as a copy of the original entire affidavit which the trial court had reviewed during the June 2004 in camera hearing. The trial court subsequently, in April 2005, authenticated the document and augmented the record accordingly. (*Galland II, supra,* 45 Cal.4th at pp. 362-363.)

However, in a second published opinion, the appellate court held that "allowing the police to retain a portion of the original search warrant affidavit was contrary to state law, deprived defendant of an adequate appellate record, and violated his right to due process." (*Galland II, supra,* 45 Cal.4th at p. 363.) The appellate court reversed the judgment of the trial court and remanded the matter to permit the defendant to withdraw his guilty plea. Subsequent to that decision, the superior court's clerk's office located a

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6 The trial court denied the request for an in camera hearing and the defendant appealed. In *Galland I*, the appellate court concluded the denial was reversible error and remanded the matter to permit the trial court to conduct the in camera review.

filed copy of the sealed affidavit which the trial court had considered during its June 2004 in camera hearing and which, while misplaced, had always been in the possession of the superior court. (*Id*. at p. 363.)

In *Galland II*, our Supreme Court stated, "The parties have asked us . . . to decide where the original sealed warrant affidavit should be stored once the search warrant has been executed and what should happen to defendant's challenges to the warrant on appeal when the original sealed affidavit has been lost." (*Galland II, supra*, 45 Cal.4th at p. 365.)

Galland II concluded, "A sealed affidavit in support of a search warrant may be retained by the requesting law enforcement agency only upon a showing (1) that disclosure of the information would impair further investigation of criminal conduct or endanger the safety of the confidential informant or the informant's family; (2) that security procedures at the court clerk's office governing a sealed search warrant affidavit are inadequate to protect the affidavit against disclosure to unauthorized persons; (3) that security procedures at the law enforcement agency or other entity are sufficient to protect the affidavit against disclosure to unauthorized persons; (4) that the law enforcement agency or other entity has procedures to ensure that the affidavit is retained for 10 years after final disposition of the noncapital case, permanently in a capital case, or until further order of the court [citation], so as to protect the defendant's right to meaningful judicial review; and (5) that the magistrate has made a sufficient record of the documents that were reviewed, including the sealed materials, so as to permit identification of the original sealed affidavit in future proceedings or to permit reconstruction of the affidavit, if necessary. Because the People failed to make such a showing here, the magistrate erred in allowing the original sealed portion of the affidavit to be retained by the police department." (*Galland II, supra*, 45 Cal.4th at pp. 359-360.)

However, *Galland II*, noting the parties' stipulation at the June 2004 in camera hearing and the trial court's April 2005 authentication finding, determined there was substantial evidence that the document so authenticated was a copy of the original entire affidavit. *Galland II* therefore concluded there was substantial evidence said copy

included a copy of the sealed affidavit, the original of which had been presented to the issuing and August 17, 2001 magistrates, and which was later lost and/or destroyed. Accordingly, *Galland II* further concluded the appellate court erred in its conclusion that suppression of evidence was required because the lost sealed affidavit rendered meaningful appellate review of the warrant impossible and violated due process. Instead, *Galland II*, holding the reconstructed record was sufficient to permit meaningful appellate review, reversed the appellate court judgment and remanded the matter for further consistent proceedings. (*Galland II*, *supra*, 45 Cal.4th at pp. 369-372.)

There is no need to decide Weatherspoon's claim that the magistrate's alleged failure to retain the sealed confidential attachment violated Weatherspoon's right to due process, nor is there any need to decide whether *Galland II* applies to this case.[7] Since we are remanding this matter as to Weatherspoon to permit the trial court to conduct the in camera hearing required by *Hobbs*, the trial court, following remand, can decide the *Hobbs*-related issues of whether the magistrate's alleged failure to retain the sealed confidential attachment violated Weatherspoon's right to due process, and to what extent, if any, *Galland II* applies to this case. (See *People v. Brooks* (1980) 26 Cal.3d 471, 474-482; Pen. Code, § 1260.)

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[7] In respondent's brief, respondent, referring to the fact that review was then pending in *Galland II*, argued there was "no need to reach the issue of whether the failure to keep the record in the trial court's file denied appellant Weatherspoon due process of law." Respondent maintained, inter alia, "since this issue is currently pending on review, it would seem prudent for this Court to wait until the Supreme Court has spoken on the issue, before deciding it here."

In respondent's petition for rehearing, filed after the decision in *Galland II*, respondent claims that *Galland II* does not apply in the present case because (1) Penal Code section 629.66, pertaining to wiretaps, states "Custody of the applications and orders shall be where the judge orders[,]" (2) *Galland II* did not involve a wiretap order and, therefore, did not consider to what extent, if any, due process considerations impact that section, and (3) according to Penal Code section 629.72, wiretap contents and evidence may be suppressed only if they were obtained in "violation of the Fourth Amendment . . . or of this chapter." (See fn. 1.)

Assuming arguendo that *Galland II* applies to this case, *Galland II* requires that three questions be answered. First, did the magistrate, on September 3, 2004, allow the sealed affidavit to be retained by law enforcement and did law enforcement retain it? Second, if so, did the People fail to make the five-point showing required by *Galland II*, with the result that the magistrate erred by allowing said affidavit to be retained by law enforcement? Third, if the magistrate so erred, did the error result in a violation of Weatherspoon's right to meaningful appellate review of said affidavit? As we discuss below, we cannot tell on this record whether the magistrate, or law enforcement, retained the sealed affidavit; the trial court, which (like the magistrate) did not have the benefit of the *Galland II* decision, failed to determine whether the magistrate erred; and we cannot tell on this record whether any such magistrate error violated Weatherspoon's right to meaningful appellate review, especially since, following remand, the People may simply produce the original sealed affidavit.

As to the first issue, although the record suggests the magistrate allowed law enforcement to retain the sealed affidavit, it is not clear from the record whether the magistrate retained said affidavit or whether law enforcement retained it. As to this issue, we note the following. Certainly, the record in the present case suggests that on September 3, 2004, the magistrate who issued the wiretap order also *ordered* that the sealed affidavit be kept in the custody of the United States Drug Enforcement Administration *and/or* the Los Angeles County District Attorney's Office.

Moreover, the People's March 17, 2006 opposition to Weatherspoon's motions indicated the unredacted affidavit set forth probable cause, an indication suggesting the sealed affidavit was, at that time, in the custody of the district attorney's office and the prosecutor who filed the opposition had reviewed the sealed affidavit. The opposition also indicated the People would provide an unredacted copy of the wiretap affidavit to the court during the in camera review, suggesting the People possessed or had access to it. On May 4, 2006, when the court called the matter, the prosecutor represented he was available for the in camera review and the affiant was en route. We note the court presiding on May 4, 2006, clearly had read the redacted affidavit, but assumed the

existence of certain facts in the sealed affidavit. The court on May 4, 2006, did not expressly state it had read the sealed affidavit. We have caused the superior court file to be transmitted to this court, and the sealed affidavit is not part of the file.[8]

In *Galland II*, a stipulation effectively established that the magistrate allowed the sealed affidavit to be retained by police. In the present case, the parties entered into no such stipulation and, indeed, conducted no evidentiary hearing. Although the facts we have recited suggest the magistrate on September 3, 2004, allowed the sealed affidavit to be retained by law enforcement, we cannot, on this record, tell whether the magistrate did or did not keep the sealed affidavit. There is no substantial *evidence* one way or the other on the issue. If the trial court in the present case had conducted an in camera hearing on Weatherspoon's motions, the court would have reviewed at that time the entire affidavit, including the sealed affidavit, if it had been available. Because no such hearing occurred, no such review of the sealed affidavit could occur, and the trial court on May 4, 2006, had no occasion to decide whether the magistrate on September 3, 2004, allowed the sealed affidavit to be retained by law enforcement. Accordingly, we will remand the matter to permit the trial court to determine whether the magistrate on September 3, 2004, allowed the sealed affidavit in the present case to be retained by law enforcement and whether law enforcement retained it.

As to the second issue, i.e., whether the People failed to make the five-point showing required by *Galland II*, with the result that, if the magistrate allowed the sealed affidavit to be retained by law enforcement, the magistrate erred, we note the following. *Galland II* concluded the August 17, 2001 magistrate in that case erred by allowing police to retain the sealed affidavit absent the five-point showing. That magistrate did not, of course, have the benefit of the *Galland II* decision, but *Galland II* nonetheless applied its showing requirement retroactively to the action of the magistrate in that case.

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8 There are multiple trial exhibits, only two of which are warrants, and neither warrant is the warrant at issue.

Similarly, in the present case, neither the magistrate nor, for that matter, the trial court had the benefit of *Galland II* at the time of the actions of the magistrate or trial court. Nonetheless, *Galland II*, if it applies to this case, applies retroactively. Because the trial court in the present case did not conduct an in camera hearing and, in any event, did not have the benefit of *Galland II*, the trial court had no occasion to decide whether, if the magistrate allowed the sealed affidavit to be retained by law enforcement, the magistrate erred by doing so absent the showing required by *Galland II*. We will remand to permit the trial court to determine the issue.

Finally, as to the issue of whether any magistrate error violated Weatherspoon's right to meaningful appellate review of the sealed affidavit, we note the following. First, even if the magistrate erred by allowing law enforcement to retain the sealed affidavit absent the requisite showing, Weatherspoon will be unable to maintain that his right to meaningful appellate review has been violated if the sealed affidavit itself is produced to the trial court at the in camera hearing or, as *Galland II* teaches, if the contents of the sealed affidavit are otherwise reconstructed or settled. Unlike the situation in *Galland II*, the record here does not demonstrate that the sealed affidavit has been lost. For all this record reflects, once the trial court following remand conducts the in camera hearing, the People may simply produce the sealed affidavit itself. The facts we have recited which suggest the magistrate allowed the sealed affidavit to be retained by law enforcement also suggest the sealed affidavit has not been lost and that meaningful appellate review of the contents of the sealed affidavit is possible. Because the trial court failed to conduct an in camera hearing, it had no occasion to reach the issue of whether any magistrate error violated Weatherspoon's right to meaningful appellate review, and we will remand the matter for the trial court to determine this issue also.[9]

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9 Weatherspoon argues the trial court's order denying his suppression motion must be reversed if the sealed affidavit cannot presently be produced to this court as part of the appellate record. This issue is not ripe for review since any appellate review of the sealed affidavit would pertain to our review of the trial court's denials of Weatherspoon's motions to quash, traverse, and suppress, and we are reversing the trial court's denials of those motions and remanding the matter for further proceedings. Moreover,

Respondent claims Weatherspoon waived the issue of whether the magistrate erroneously failed to keep the sealed affidavit. We disagree. The trial court was supposed to review the sealed affidavit during an in camera hearing. We already have concluded that an objection raising the issue of the trial court's failure to conduct the in camera hearing would have been futile. An objection raising the issue of the trial court's failure to keep the sealed affidavit would have been equally futile.

3. *Mrakich's Testimony Concerning the Meaning of Certain Words Was Admissible.*

a. *Pertinent Facts.*

Los Angeles Police Detective Christian Mrakich testified during direct examination by the People that he had been a Los Angeles police officer for 13 years. He testified as follows concerning his training and experience in narcotics investigations. Mrakich received training at the academy concerning packaging, manufacturing, and identification of narcotics, and concerning the different manners in which it is sold and ingested. As a uniformed officer, he was in daily contact with narcotics dealers and users.

Mrakich later was assigned to specialized units that targeted street-level narcotics dealers and drug sellers in rock houses, and he conducted countless hours of narcotics surveillance. He also conducted surveillance of high-level drug dealers, and had worked extensively with criminal and undercover informants. During the previous four or five years, Mrakich had been assigned to two different LAPD/Federal Bureau of Investigation task forces focused on high-level narcotics dealers who manufactured and distributed narcotics in California and other states. He had written over 150 narcotics search warrants and had conducted countless interviews with narcotics users, dealers, distributors, and manufacturers, and had discussed their various methods of operation.

Weatherspoon's argument ignores that the sealed affidavit itself may not be a prerequisite to meaningful appellate review if its contents can be otherwise reliably determined. (See *Galland II*, *supra*, 45 Cal.4th at p. 370.)

Mrakich could not say how many times during the past 13 years he had qualified in court as an expert in narcotics investigations. However, during the year prior to his testimony, he had testified as a narcotics expert perhaps 40 times. Mrakich had received training in the technical, practical, and legal aspects of wiretaps, and had been certified by the Attorney General to conduct wiretaps.

Mrakich testified there were certain words in narcotics that were common everyday terms. However, middle-level or higher-level narcotics crews might adopt their own vernacular or code words. The codes were deciphered by talking with informants and arrestees concerning the meaning of the coded terms, and by combining that information with information learned during seizures of narcotics, surveillance, and, as in the present case, monitoring phone calls. During the investigation, Mrakich and assisting officers maintained on a large board a glossary of recurring words that were significant to the investigation.

During direct examination by the People, Mrakich testified that a "jar" was a vessel used for cooking powder cocaine, a "mall" was a place for narcotics transactions, "steels" were firearms, "choppers" were AK-47 type weapons, and "heavyweight steels" were large caliber weapons.

b. *Analysis.*

Weatherspoon claims the trial court erred as to counts 3 and 4 by receiving the above testimony concerning the meaning of terms. We disagree.

An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

We have recited pertinent facts concerning Mrakich's expertise. The trial court reasonably could have concluded that the terms were part of narcotics terminology and that Mrakich was sufficiently familiar with the terminology to accurately interpret the words. The use of an expert for this purpose is not uncommon. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1106-1107; *People v. Velasquez* (1976) 54 Cal.App.3d 695, 699.) Here, the trial court reasonably could have concluded the meaning of the words was

"sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." The trial court did not err by receiving Mrakich's testimony concerning the meaning of the above mentioned words. The testimony was relevant and admissible, inter alia, to prove Weatherspoon's knowing possession of the weapons at issue (and knowing possession with respect to the narcotics offenses). (Cf. *People v. Champion* (1995) 9 Cal.4th 879, 924-925; see *People v. Ochoa* (2001) 26 Cal.4th 398, 438-439; Evid. Code, § 801, subd. (a).) Moreover, application of the ordinary rules of evidence, as here, does not violate a defendant's right to due process. (See *People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)[10]

4. *The Trial Court Properly Denied Wilson's Motion to Traverse the Residential Search Warrant.*

a. *Pertinent Facts.*

(1) *The Motion to Traverse.*

On December 8, 2005, Wilson filed a motion to controvert (hereafter, motion to traverse) a search warrant and to suppress evidence. The motion contained a copy of the warrant, which commanded the search of, inter alia, the residence at 797 West Hawthorne, Bloomington, California. The motion contained the following documents.

(a) *LAPD Case Summary.*

One document was an undated Los Angeles Police Department (LAPD) case summary concerning an LAPD asset forfeiture case involving Wilson and $21,093.57

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10 Weatherspoon argues Mrakich testified in similarly improper fashion as reflected at pages "1264-1363" of the reporter's transcript. The burden is on Weatherspoon to demonstrate error from the record. (*In re Kathy P*. (1979) 25 Cal.3d 91, 102.) It is not the responsibility of this court to canvass 100 pages of transcript in search of the alleged factual basis for Weatherspoon's arguments; therefore, to the extent he complains about Mrakich's testimony concerning words other than those mentioned in the text of our analysis, there is no need to reverse the judgment. (Cf. *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2*; People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) Finally, in light of our analysis on the merits, there is no need to decide respondent's claim that Weatherspoon waived the admissibility issues by failing to properly raise them below.

(hereafter, $22,000). The summary was written by Los Angeles Police Detective Dennis Packer. Packer was assigned to the asset forfeiture investigative detail of the narcotics division. The summary indicated, in pertinent part, as follows.

On October 6, 2004, police conducted a traffic stop and recovered $22,000 from Wilson. Wilson told police he was a record producer, and he was in the neighborhood collecting money from his clients. On October 27, 2004, Packer was assigned to the case. A detective told Packer that a case agent would furnish to Packer the particulars about how the money was connected to drug trafficking. On November 16, 2004, Packer called the case agent and asked for any evidence connecting the money to criminal activity. The case agent assured Packer the case agent would provide the necessary information to Packer by November 18, 2004.

On November 18, 2004, Packer interviewed Wilson and his counsel at the police station. Wilson and his counsel discussed with Packer the personal and business life of Wilson, Wilson's criminal history, and the reason he had been in the area where the stop had occurred. Wilson and his counsel gave Packer eight documents to support Wilson's claim that the money was not connected with illegal activity. Packer stated in the summary, "Wilson's arguments were found to be plausible." (Some capitalization omitted.) On November 18, 2004, Packer again phoned the case agent, received no answer, and left a message for the case agent to call Packer.

On November 19, 2004, Packer discussed the case with his supervisor, and the supervisor agreed that the money should be returned to Wilson. Packer informed Wilson's counsel of the release of the money. Packer stated in the summary, "Based on the aforementioned circumstances the seizure of the money does not meet the criteria for a state or federal forfeiture and should be classified as an In-House Reject."

(b) *The Warrant and Affidavit.*

The motion to traverse also contained the warrant and affidavit. The warrant was issued, and the affidavit was signed, on February 14, 2005. The affidavit, signed by Mrakich, contained a statement of probable cause which reflected, in pertinent part, as follows: "On October 6, 2004, information obtained from State wiretap 04-63 led us to

believe Wilson was making a large delivery of cocaine to Weatherspoon. Wilson made the delivery and was subsequently followed and detained for a narcotics investigation. During the detention we recovered over $20,000.00 which we believed to be proceeds from the sale of cocaine. At the time of the stop, Wilson was driving a 2003 Infinity. . . ." The Infinity was registered to Wilson's girlfriend at the Bloomington address.[11]

(2) *The December 21, 2005 Hearing on the Motion.*

On December 21, 2005, the court conducted a hearing on the motion to traverse. The trial court found that Wilson made the requisite substantial showing entitling him to an evidentiary hearing. Proceedings were continued.

(3) *The People's January 21, 2006 Opposition to the Motion.*

On January 11, 2006, the People filed an opposition to the motion to traverse. The opposition contained a copy of a transcript of Mrakich's May 12, 2005 preliminary hearing testimony. Mrakich testified at the preliminary hearing about an administrative proceeding which led to the return to Wilson of the money which had been found in his car. The fact that the money had been returned did not change Mrakich's opinion as to the source of the money.

Mrakich also testified at the preliminary hearing that he had spoken with the investigator who handled money forfeitures, and the investigator had wanted Mrakich to reveal the source of the information that had led to the traffic stop and the seizure of the money. If Mrakich had disclosed to the investigator that source, namely, the wiretap, the

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11 The motion to traverse contained a memorandum of points and authorities dated December 6, 2005. In the memorandum, Wilson's counsel made the unsworn statement that discovery obtained from the prosecutor's office strongly suggested that on December 28, 2004, Packer and Mrakich contacted each other concerning the status of Wilson's forfeited money and the investigation concerning him. The statement referred to an exhibit D. Exhibit D, attached to the motion, purported to be a handwritten note from Packer to Mrakich, dated December 28, 2004, concerning Wilson. The note stated, "Let me know when take-down occurs so I can freeze his bank account." The note did not expressly refer to the $22,000, or state how much money, if any, was in the bank account.

fact of the wiretap would have been information discoverable by Wilson. Discovery of the wiretap by Wilson would have ended a narcotics investigation that was larger in scope then the $22,000 at issue. Law enforcement had photographed the money, so returning it to Wilson was a small price to pay compared to the termination of an investigation spanning numerous counties and states. Accordingly, Mrakich did not disclose the source of the information to the investigator and the money was returned.

(4) *The January 13, 2006 Hearing On the Motion.*

On January 13, 2006, the trial court resumed the hearing on the motion and indicated as follows. The court had read the People's opposition. The court did not know there had been preliminary hearing testimony concerning why the money had been returned, and that "the reason they gave it back is they didn't want to burn the wiretap, at that point, on the ongoing investigation." If the affidavit had stated that the reason the proceeds had been returned to Wilson was not that the proceeds were not drug money but that Mrakich did not want to compromise an ongoing investigation, the magistrate would have issued the warrant anyway. The court concluded Wilson had not shown that Mrakich made material misrepresentations in the affidavit. The court also concluded the affidavit set forth probable cause even absent the statement in the affidavit that the officers believed the money was proceeds from the sale of cocaine. The court denied Wilson's motions to traverse the warrant and suppress evidence.

Evidence was presented at trial that police recovered a shotgun from the Bloomington home. The shotgun is the weapon at issue in count 7.

b. *Analysis.*

Wilson claims the trial court reversibly erred as to count 7 by denying his motions to traverse the warrant and suppress the evidence of the shotgun, because the supporting affidavit contained intentionally false or reckless statements. He argues the case summary reflects that in November 2004 (1) Wilson's counsel submitted to Packer eight documents in support of Wilson's claim that the $22,000 was not derived from illegal activity, (2) Packer found credible Wilson's explanations for possessing the $22,000, and (3) Packer concluded the $22,000 was not proceeds from drug transactions. Wilson then

notes that the February 14, 2005 affidavit supporting the warrant omits these three alleged facts. Wilson therefore concludes the omission demonstrates Mrakich knew that his statement in the affidavit that "we believed [the $22,000] to be proceeds from the sale of cocaine" was false. We reject Wilson's claim.

"In *Franks v. Delaware*[, *supra*,] 438 U.S. 154 [98 S.Ct. 2674], the United States Supreme Court held that a defendant may challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. When presented with such a challenge, the lower courts must conduct an evidentiary hearing if a defendant makes a substantial showing that: (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to justify a finding of probable cause. At the evidentiary hearing, if the statements are proved by a preponderance of the evidence to be false or reckless, they must be considered excised. If the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized pursuant to that warrant must be suppressed. (*Id*. at pp. 155-156 [98 S. Ct. at pp. 2676-2688].)" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297.)

Wilson did not make a motion to quash the warrant.[12] We assume, therefore, the allegations of the affidavit (including the allegation "we believed [the $22,000] to be proceeds from the sale of cocaine") are facially true and sufficient to establish probable cause to search the residence. The remaining issue is whether Wilson's motion to traverse the warrant, a subfacial sufficiency challenge, demonstrates the allegation that "we believed [the $22,000] to be proceeds from the sale of cocaine" was deliberately false with the result that the affidavit failed to set forth probable cause.

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12 A motion to quash tests the facial sufficiency of the warrant. (See Pen. Code, § 1538.5, subd. (a)(1)(B)(i).) A motion to traverse tests the probable cause showing, and not merely facially. (See Pen. Code, § 1538.5, subd. (a)(1)(B)(iii)).

According to Packer's case summary, a detective told Packer that he would be given particulars concerning how the money was connected to drug trafficking, and Packer later unsuccessfully tried to obtain the evidence from a case agent. On November 16, 2004, Wilson and his counsel provided to Packer an innocent explanation as to why Wilson had possessed the proceeds. At that time, Packer was faced with a self-serving but uncontradicted innocent explanation from Wilson as to why he possessed the proceeds. It was in that factual context that Packer indicated Wilson's arguments were found to be "plausible."

Notwithstanding Wilson's suggestions to the contrary, Packer did not state in his case summary that he found Wilson's explanations credible or persuasive. Nor did Packer state in his summary that he concluded the proceeds were not proceeds from drug transactions. Moreover, apparently, even after Wilson's arguments were found plausible, Packer again unsuccessfully tried to get information from the case agent. Wilson does not expressly dispute the allegations in the affidavit that "On October 6, 2004, information obtained from State wiretap 04-63 led us to believe Wilson was making a large delivery of cocaine to Weatherspoon. *Wilson made the delivery* and was subsequently followed and detained for a narcotics investigation." (Italics added.) The fact that Wilson's exculpating explanation was found plausible did not mean an inculpating explanation was not plausible. Nothing in the case summary demonstrated the affidavit contained false or reckless statements.

The above is reinforced by Mrakich's preliminary hearing testimony. The gravamen of it was that he continued to believe the proceeds were connected with drug activity but returned the proceeds so he would not have to disclose the source of his information and jeopardize a larger narcotics investigation. Neither the return of the proceeds to Wilson nor the circumstances surrounding that return demonstrated the $22,000 was not the proceeds of a cocaine sale.

We conclude the trial court did not err by denying Wilson's motions to traverse and suppress evidence. Wilson failed to demonstrate that Mrakich's statement in the affidavit that "we believed [the $22,000] to be proceeds from the sale of cocaine" was false or reckless, or that Mrakich deliberately or recklessly omitted from the affidavit the alleged facts that (1) Wilson's counsel submitted to Packer eight documents in support of Wilson's claim that the $22,000 was not derived from illegal activity, (2) Packer found credible Wilson's explanations for possessing the $22,000, and (3) Packer concluded the $22,000 was not proceeds from drug transactions. (Cf. *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1581-1582.)[13]

5. *The Trial Court Did Not Err by Denying Wilson's Motion for a Mistrial.*

a. *Pertinent Facts.*

The prospective jurors included two women, juror Nos. 1565 and 2184.[14] During voir dire of the prospective jurors, the court asked if two weeks of jury service would pose a hardship. Juror No. 1565, a married, self-employed psychotherapist with a 15-year-old son, testified as follows. Two weeks of jury service would impose extreme hardship on her family. She did not get paid for time away from work, and if she was selected to serve as a juror, she would probably transfer a few of her "patients in crisis" to other clinicians. Juror No. 1565 had written a couple of reports for attorneys, probably more than 15 years earlier. She had undergone training in an agency that worked with

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[13] In light of our conclusion, there is no need for us to consider whether the trial court's denials of the motions to traverse and suppress were proper for the additional reason that the affidavit set forth probable cause to search even absent Mrakich's statement that "we believed [the $22,000] to be proceeds from the sale of cocaine." Nor is there any need to consider whether the good faith exception to the exclusionary rule (see *United States v. Leon* (1984) 468 U.S. 897 [104 S.Ct. 3405]) applies in the present case. Finally, respondent indicates he does not dispute that Wilson had "standing" to assert his Fourth Amendment rights as to the residence at issue, therefore, there is no need for us to consider whether he had a privacy interest in the house.

[14] We refer to prospective jurors individually as jurors.

babies who had been born addicted to cocaine. Juror No. 1565's brother had been addicted to heroin.

Juror No. 2184, an interior designer, testified as follows. When juror No. 2184 was in college, she "did a study group" with young women in Colorado's criminal justice system. She worked with the women for about six months and "did orientation for drug abuse."

The People later exercised seven peremptory challenges, and the first six excused female jurors, including juror Nos. 1565 and 2184. After the People exercised the seventh peremptory challenge, Wilson moved for a mistrial, arguing the People impermissibly excused the first six female jurors based on group bias towards women. The trial court asked if the People wanted to address the issue of whether Wilson had made a prima facie showing. The court did not expressly find that Wilson had made such a showing.

The People explained why they had excused each of the six female jurors. The prosecutor explained that her reason for excusing juror No. 1565 related to that juror's first statement to the court, namely, that jury service would result in financial hardship. The prosecutor knew juror No. 1565 had written psychiatric evaluations for people in the criminal courts, but the prosecutor's main concern was that the prosecutor did not necessarily want a person who had "expressed her financial hardship." The prosecutor added, "At this time [juror No. 1565] was saying she had people in crisis that she didn't want to deal with." (*Sic*.) The prosecutor wanted someone who could sit as a juror and concentrate on the case.

As to juror No. 2184, the prosecutor explained that, as a college student, the juror was very involved with people involved with drugs. This gave the prosecutor concerns that the juror might have had a more liberal attitude towards narcotics.

Based solely on the fact that six of the seven persons excused by the prosecutor were women, the court concluded Wilson had made a prima facie showing of group bias based on gender. However, the court also stated it accepted the prosecutor's "explanation." The court added, "I think there are legitimate issues as to each of them,

particularly as to their attitudes or experiences with the law enforcement community and drug issues, . . . all of which are factors other than sex that justify excusing the jurors. [¶] And for that reason, the motion is denied."

b. *Analysis.*

Wilson claims the trial court erred by denying his motion for a mistrial. We disagree. Our Supreme Court has observed that "There is a presumption that a prosecutor uses his or her peremptory challenges in a constitutional manner." (*People v. Turner* (1994) 8 Cal.4th 137, 165.) In *People v. Fuentes* (1991) 54 Cal.3d 707, our Supreme Court stated, "This court and the high court have professed confidence in trial judges' ability to determine the sufficiency of the prosecutor's explanations. In *Wheeler*, we said that we will 'rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' (*Wheeler* [(1978)] 22 Cal.3d [258,] 282.) Similarly, the high court stated in *Batson v. Kentucky* [(1986) 476 U.S. 79], that 'the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility,' and for that reason 'a reviewing court ordinarily should give those findings great deference.'. . ." (*People v. Fuentes, supra,* 54 Cal.3d at p. 714.) If substantial evidence supports the trial court's findings, we may affirm them. (*People v. Williams* (1997) 16 Cal.4th 635, 666.)

Wilson argues the trial court erred by finding that the People's explanations for excusing juror Nos. 1565 and 2184 were gender-neutral.[15] We reject the argument. Juror No. 1565 explained that jury service would result in financial hardship. The trial court would have been entitled to excuse juror No. 1565 for cause based on "undue

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[15] To the extent Wilson claims the prosecutor's reasons for excusing the other four women were not valid, we reject the claim. Wilson's briefs provide argument only as to juror Nos. 1565 and 2184, and, in his reply brief, Wilson guardedly argues the prosecutor lacked valid reasons for excusing "at least" juror Nos. 1565 and 2184. Wilson's claim as to the other four women is presented in perfunctory fashion without argument, and we reject that claim for that reason. (Cf. *People v. Jones* (1998) 17 Cal.4th 279, 305.)

hardship" within the meaning of Code of Civil Procedure section 204, subdivision (b). (See *People v. Gonzales* (2008) 165 Cal.App.4th 620, 625 fn. 8.) The fact the trial court did not do so did not prevent the People from exercising a peremptory challenge for financial hardship.

Juror No. 2184 testified that, as a college student, she was very involved with people involved with drugs. The prosecutor reasonably might have concluded that, for this reason, juror No. 2184 was less prosecution-oriented. (Cf. *People v. Landry* (1996) 49 Cal.App.4th 785, 789.) Substantial evidence supports the trial court's findings that the prosecutor excused juror Nos. 1565 and 2184 for gender-neutral reasons. The trial court correctly denied Wilson's motion for a mistrial.[16]

DISPOSITION

The judgment as to Weatherspoon, and the orders denying his motions to quash and traverse the warrant, and to suppress evidence, are reversed, and the matter is remanded to the trial court with directions to conduct an in camera hearing with respect to his motions, consistent with this opinion and *People v. Hobbs*, *supra,* 7 Cal.4th 948, 971-975. If, after said in camera hearing and the related proceedings, the court denies Weatherspoon's suppression motion, the court shall reinstate the judgment. If, after said in camera hearing and the related proceedings, the court grants Weatherspoon's suppression motion, the trial court shall grant Weatherspoon a new trial, unless the evidence which should have been suppressed at his previous trial was harmless beyond a reasonable doubt, in which case the court shall reinstate the judgment. Moreover, notwithstanding the above, the trial court is also directed to determine the issue of whether the magistrate on September 3, 2004, failed to retain the sealed confidential

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16 To the extent Wilson seeks comparative juror analysis, there is no need to provide same. Recently, our Supreme Court in *People v. Lenix* (2008) 44 Cal.4th 602, observed that appellate review of issues of comparative juror analysis is "necessarily circumscribed" (*id.* at p. 624) and "[t]he reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment" (*ibid*.; see *People v. Cruz* (2008) 44 Cal.4th 636, 659, fn. 5). Wilson has identified no such jurors.

attachment, thereby violating Weatherspoon's right to due process, including the issues of whether *Galland II* applies to this case, and, assuming it does, whether the magistrate erred by allowing law enforcement to retain the "*Hobbs* Confidential Attachment" (sealed affidavit) incorporated by reference into the affidavit supporting the wiretap order issued on that date and, if so, whether any such error violated Weatherspoon's right to meaningful appellate review. The judgment as to Wilson is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.